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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 245

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions in the court below (S. P. 2-11)[1] are reported in 167 F. 2d 983. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 8-44) are reported in 73 N. L. R. B. 1463.

[1] The record before this Court consists of the appendix to the Board's brief in the court below, herein designated "B. A.", the appendix to the Company's brief in the court below, herein designated "C. A.", and the supplemental proceedings in the court below, herein designated "S. P."

JURISDICTION

The decree of the court below (S. P. 12-14) was entered on May 26, 1948. The petition for certiorari was filed on August 26, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now Section 1254 of 28 U. S. C., as codified June 25, 1948) and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether life insurance salesmen who are required to devote their full time to the Company's business and who are furnished office space, desk, telephone and supplies by the Company which also pays for their indemnity bonds and license fees and closely supervises their sales efforts, are employees or independent contractors within the meaning of Section 2 (3) of the National Labor Relations Act, as amended.

2. Whether the conduct of insurance salesmen in meeting to discuss the effect upon their efficiency of the frequent change of cashiers, designating one of their number to draft a letter to the Company setting forth their views respecting this matter and revising such a letter, constituted concerted activities for mutual aid or protection within the meaning of Section 7 of the National Labor Relations Act.

3. Whether the National Labor Relations Board is empowered to remedy the unfair labor practice

of an employer engaged in interstate commerce where there is no showing that the unfair labor practice has actually affected or burdened interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Supp. I, 141 *et seq.*) are set forth in the Appendix, *infra*, pp. 22-26.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on June 6, 1947, issued its findings of fact, conclusions of law, and order (S. P. 8-15). The pertinent facts, as found by the Board, may be summarized as follows:

The Phoenix Mutual Life Insurance Company, hereinafter called the Company, is a mutual life insurance company engaged in the business of selling and issuing life insurance policies and annuities and in the investment of its funds in real estate and a variety of securities (B. A. 19; 141, 146). On the basis of total insurance in force, the Company ranks no lower than twenty-fourth among all insurance companies in the United States (B. A. 19; 49, 142, 146). The Company had in force on December 31, 1945, $[illegible]4,789,831

worth of insurance (B. A. 19; 142, 146). On the same date its total assets amounted to $386,044,844, including United States Government bonds valued at $146,324,512, Canadian Provincial bonds valued at $72,834,695, and bank, insurance and public utility stocks having a market value of $3,529,776 (B. A. 19; 141-142, 146). The industrial, public utility, banking, and insurance corporations whose securities are owned by the Company, operate on a nation-wide basis (B. A. 19; 142, 146).

The Company has its principal office in Hartford, Connecticut (B. A. 19; 141, 146). It conducts business in thirty-three states and in the District of Columbia (B. A. 19; 142, 146). It has two branch offices in Chicago, Illinois, one of which, known as the Chicago-LaSalle office was staffed in September 1944 with a manager, Herbig, ten insurance salesmen, a cashier, assistant cashier, and four clerks and stenographers who worked under the supervision of the cashier (B. A. 19, 23-24; 56, 74-75, 100, 105. 111, 141, 146). The personnel working within the Chicago-LaSalle office are constantly engaged in the solicitation of applications for insurance, the collection of premiums, and the forwarding of such applications and premiums to the home office (B. A. 20-21; 50-54, 68, 77-78, 153). Likewise they render various services to policyholders and beneficiaries, in connection with the payment of benefits to them (B. A. 20-21; 77-78). Some of the salesmen stationed at the Chicago-LaSalle office are assigned to solicit and service customers

in an area including parts of both Illinois and Indiana (B. A. 96, 117).

The Company selected its agents from among those persons who made written applications for these positions and after personal interviews with them, much as individuals are selected for other positions in the business world (B. A. 26; 66-67, 165-180). To be selected as an insurance salesman it was not necessary for the applicant to have had previous experience at selling insurance or any other commodity (B. A. 177-179, Tr. 197).

Each person selected, after signing an agency contract with the Company, is given intensive training by the Company's supervisory staff (B. A. 26; 51, 72, 75-76, 115-116). He spends the first two weeks of his employment in the Company's offices, receiving instructions from the Company's office manager or other supervisory personnel in regard to the use of company forms, the company rate books, the making of various reports required by the Company, the keeping of records of the agents' business activities, and in sales talks prepared by the Company for the use of its agents (B. A. 26; 51, 72, 96, 115, 193, 74, 95). The Company has publicized this training period as essential if "agents were to earn the living to which they were entitled, and if the public was to receive the life insurance service it had a right to expect" (B. A. 26; 193). The agents are required to attend staff meetings weekly, or at least once a month, at which times they receive various instructions in regard

to their sales work, are notified of contests conducted by management, and occasionally receive policyholder leads from management (B. A. 27; 76, 83-84, 97, 116).

The Company furnishes each salesman with office space, a desk, a telephone, stenographic service, stationery, postage, filing cabinets, sales supplies and business cards (B. A. 26-27; 53, 64, 82, 89, 95-96, 109). It also pays for the indemnity bonds and license fees which the State of Illinois requires of each insurance agent (B. A. 27; 95).

Each salesman is required to devote his full time to the Company's business (B. A. 27; 52-53, 68, 71, 162, 186). He may not assign his contract and may not employ anyone to work under him (B. A. 27; 186). He is paid on a commission basis and under some circumstances receives fees and bonuses in addition (B. A. 26; 68, 71, 73, 77-78, 97, 183-185, 200, 201, 209). The Company requires each salesman to produce a specified minimum of new business each year; if he fails to do so, he is discharged, that is, his contract is cancelled upon thirty days' notice (B. A. 28; 71, 74, 95, 191, 192).

The Company maintains a plan for the retirement and pensioning of its salesmen (B. A. 29; 114). This retirement and pensioning plan is non-contributory on the part of its salesmen, although they have the privilege of increasing their retirement income through voluntary participation (B. A. 29; Bd. Exh. 20, pp. 7-8).

The cashier's department in the Chicago-LaSalle office in addition to acting as a service department to the public and to the home office, has the responsibility of serving the salesmen efficiently (B. A. 23; 136, Tr. 390). It maintains records concerning applications received and policies issued, collects premiums from salesmen or policyholders, disburses initial commissions to salesmen and furnishes them with stenographic service (B. A. 23; 96, 119, Tr. 371-373, 377). It is also the function of the cashier's department, when requested, to furnish information to salesmen concerning policies, premiums, dividends, conversions, and beneficiaries, and in general to assist them with information not generally known or published (B. A. 23; 85-87, 89-90, 119, Tr. 370-380, 385-388). Employees of the cashier's department work in close cooperation with the salesmen who are often aided or hindered by the degree of efficiency displayed by them (B. A. 23; 84, 135-136, Tr. 383, 390). Inconvenience, embarrassment, added work, or even loss of sales to prospective customers have resulted to the salesmen from such incidents as an error which a cashier made in calculating costs to guide the salesmen in dealing with prospective policyholders, the erroneous application by the cashier of dividends which had accrued to a policyholder, the inability of a cashier to furnish answers to particular questions concerning policies, and faulty information supplied by a cashier respect-

ing a settlement agreement (B. A. 23-24; 86-88, 89-92, 99, 136).

On or about September 1, 1944, Herbig, the manager of the Chicago-LaSalle Office, called a meeting of the salesmen and announced the resignation of the cashier. He told them that the matter of a successor was under consideration by the home office and that a new cashier would probably be sent in from another branch office (B. A. 24; 97-98). This announcement was of considerable importance to the salesmen by reason of their dependence upon the cashier's department for information and assistance affecting their earnings (B. A. 24; 89-92, 99). During the two weeks after Herbig's announcement, the salesmen discussed the matter of a successor at length (B. A. 24; 97-98).

On the morning of September 11 and again at lunch that day, the salesmen met to consider their dissatisfaction over the fact that the Company had had four different cashiers during the last few years, resulting in inconvenience to them and loss of their time in "breaking in" new cashiers (B. A. 24; 57-58, 99-101, 132). They discussed the advisability of making a recommendation to the Company in regard to the situation (*ibid.*). All of them agreed that the Company's then assistant cashier was well qualified to fill the vacancy and that they would prefer her to an outsider but there was some disagreement as to whether the salesmen should recommend the appointment of any

specific person (B. A. 24; 57, 100, 106-107). Salesman Clarence M. Davis was designated by the group to write a letter in regard to the cashier situation which, if approved and signed by all of the ten salesmen, was to be sent to the home office (B. A. 24; 104). Davis, with the assistance of Salesman W. Donald Johnson and other salesmen, prepared a tentative draft of such a letter which was discussed and revised at another luncheon meeting of the salesmen (B. A. 24; 104-107).

Before its contents had been finally decided upon, Manager Herbig learned of the proposed letter and questioned Salesman Goldberg about it (B. A. 24; 58). Goldberg explained that the final drafting of the letter had not been completed and that he therefore did not know what the contents would be (B. A. 24-25; 58). Herbig thereupon advised him not to sign it (B. A. 25; 58-59).

On September 15, before Davis had an opportunity to put the letter in final form, he and Johnson, who had been assisting him, received notices from the Company terminating their agency contracts and letters explaining the summary action (B. A. 25; 107-108, 124, 210-211, 214-215). Except for the prefatory sentence to Johnson's letter stating that "For some time your disregard and disapproval of the Phoenix Mutual, its Staff, and most of its programs have been quite apparent to observers," the letters to both Johnson and Davis were identical (B. A. 25, n. 15; 210, 214). Each stated, "Your recent actions and involvement in the

resignations and new appointment affecting our Cashier's Department has been so far beyond the premise of your responsibility, and so completely unpleasant that in full agreement with the Home Office we are cancelling your Agent's Contract, effective thirty days from today" (B. A. 25, n. 14; 210, 214). The letters instructed Davis and Johnson to turn in their supplies and rate books and to have their desks cleaned out and their agency affairs closed by noon of the following day, September 16 (*ibid.*).

Although Herbig informed Johnson immediately after discharging him that he was disliked by personnel in the home office, the Company offered no explanation for this statement (B. A. 12, n. 3; 124-125).

Upon the basis of the foregoing facts the Board concluded that the salesmen were employees of the Company within the meaning of Section 2 (3) of the Act and not independent contractors (B. A. 25-29), that their conduct in discussing the replacement of the cashier and in taking steps towards presenting their views to the Company constituted concerted activities for mutual aid or protection within the meaning of Section 7 of the Act (B. A. 10-11, 29-32), that the Company, by discharging Davis and Johnson for such concerted activities and by warning Goldberg not to participate therein, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (B. A. 8-9, 32-35), and that these unfair labor

practices tend to lead to labor disputes burdening and obstructing commerce (B. A. 35). The Board accordingly ordered the Company to cease and desist from such unfair labor practices, to reinstate Davis and Johnson with back pay and to post the usual notices (B. A. 14-15).

The Board filed a petition for enforcement of its order in the court below (B. A. 1-5) and on May 7, 1948, the court, with one judge dissenting, handed down its opinion (S. P. 2-11) sustaining the Board's order in full. On May 26, 1948, the court entered its decree of enforcement (S. P. 12-14).

ARGUMENT

1. The Company contends (Pet. 12-18) that it is important for this Court to decide whether the insurance agents were employees or independent contractors, particularly in the light of the amendatory legislation in which, the Company claims, Congress has manifested its disapproval of the test prescribed by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, *United States* v. *Silk*, 331 U. S. 704, and *Bartels* v. *Birmingham*, 332 U. S. 126.[2]

The court below in the instant case, however, did not refer to any of the above decisions but only to

[2] The Labor Management Relations Act, 1947 amended Section 2(3) of the original National Labor Relations Act so as to provide:

> "The term "employee" * * * shall not include * * * any individual having the status of an independent contractor * * *.

its prior ruling in *Williams* v. *United States,* 126 F. 2d 129, certiorari denied, 317 U. S. 655, in which it applied the common law test of employee relationship. The opinion below on its face (S. R. 5-7) makes it plain that the court was giving effect to the common law principles which it is claimed Congress approved in the recent legislation referred to. The case thus raises no question as to the test to be applied, for even under the narrow common law doctrine the insurance agents have been properly held to be employees.[3]

Whether the insurance salesmen here involved were employees and not independent contractors

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The Gearhart Resolution of June 14, 1948 (Pub. Law 642, 80th Cong., 2d Sess.) amended the definitional clauses of the Social Security Act so as to contain the following provision:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

[3] The Company contends that all the issues in this case must be determined under the Act as amended by the Labor Management Relations Act (Pet. 14). The only change upon which the Company relies is the express exclusion of independent contractors from the benefits of the Act. Section 2 (3) of the Act as amended, *infra*, p. 24. Since the Board here found that the agents were not independent contractors (B. A. 27), we believe that its order is not affected by the amendments. But, in any event, the amendments have no retroactive effect as to portions of the order which remedy past violations. *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board,* 332 U. S. 840, and the Board's brief therein. Thus, the right of the employees to reinstatement with back pay is governed by the original Act, which was in effect at the time of their discharge.

turns, of course, upon the facts of the particular case and would ordinarily not present a question worthy of review by this Court.

The Company contends that this case places before the Court an issue as to the status of "ordinary life insurance agents" (Pet. 5, 12), described as "a group whose large numbers play a vital role in our national economy" (Pet. 18). The court below pointed out that the Company "regarded its salesmen as being in a somewhat different class than ordinary insurance salesmen" (S. P. 7). Indeed the Company publicly advertises that it is "the only company on the American continent which employs a small, compact, and exclusively full-time sales representation" (B. A. 170). The description of the relationship between the Company and the agents here involved, as set forth in the decisions of the Board (B. A. 25-29) and the court below (S. P. 5-7), shows that these agents differed in many important respects from the agents described in the cases cited by petitioner (Pet. 18) which hold that the particular life insurance salesmen there involved were not employees.[4] In cases where the facts show a rela-

[4] In the first case cited by the Company (Pet. 18) for the proposition that ordinary life insurance agents are independent contractors at common law, the actual holding was that such agents were employees for the purpose of the Illinois Unemployment Compensation Act. *New York Life Insurance Co.* v. *Murphy*, 388 Ill. 316, 58 N. E. 2d 182. In the second case cited the insurance company was held not liable for injuries inflicted by an insurance agent whom the court held to be an employee in his relationship to the company in collecting industrial debits but not an employee when exercising his

tionship which most nearly approaches that here shown, the courts have held the relationship to be that of employer-employee. See e.g., *Chatelain* v. *Thackeray,* 98 Utah 525, 100 P. 2d 191; *Miller* v. *Metropolitan Life Insurance Co.,* 134 Ohio St. 289, 16 N. E. 2d 447; *Unemployment Compensation Commission of N. C.* v. *Jefferson Standard Life Insurance Co.,* 215 N. C. 479, 2 S. E. 2d 584; *Fidelity Union Life Insurance Co.* v. *McGinnis* (Tex. Civ. App.), 62 S. W. 2d 186; *Industrial Commission* v. *Northwestern Mutual Life Insurance Co.,* 103 Colo. 550, 88 P. 2d 560; *Life and Casualty Ins. Co.* v. *Unemployment Compensation Commission of Virginia,* 178 Va. 46, 16 S. E. 2d 357; *Hall* v. *Sera,* 112 Conn. 291, 152 Atl. 148.

Furthermore, we submit, the Board and the court below were clearly correct in finding that the salesmen were employees rather than independent contractors. As we have seen, they had no independent calling or business of their own and were

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option to sell life insurance outside the scope of his regular employment, the accident having occurred while the agent was returning from a call to sell life insurance made outside the area assigned to him for his industrial insurance activities. *Vert* v. *Metropolitan Life Insurance Co.,* 342 Mo. 629, 117 S. W. 2d 252, 116 A. L. R. 1381. The next two cases (*American National Insurance Co.* v. *Denke,* 128 Tex. 229, 95 S. W. 2d 370; *Luquire Insurance Co.* v. *McCalla,* 244 Ala. 479, 13 So. 2d 865) do not involve life insurance agents but rather industrial insurance agents whom petitioner elsewhere labels "debit collectors" who are to be distinguished from life insurance agents (See Point II under the Summary of Argument at Pet. i and also p. 14). The last case cited involved an agent who, unlike the agents here involved, sold insurance for a number of companies. *American Savings Life Insurance Co.* v. *Riplinger,* 249 Ky. 8, 60 S. W. 2d 115.

obliged to devote their entire working time to the Company's business (*supra*, pp. 5-6).

The Company not only had the right to exercise a large measure of control over the work of its salesmen—an important element in determining the employer-employee relationship—but it actually exercised this right. It gave each salesman detailed instructions in regard to its business upon hiring him, even preparing sales talks for him and, during the early period of his tenure, accompanying him while he made his sales presentations and afterwards criticizing such presentations (B. A. 54, 116). By virtue of the very nature of the work, the Company could not, of course, continue to direct and control all the details of the salesmen's activities. This is true of many persons having unquestioned employee status.

Even after the initial training period had passed, however, the Company continued to exercise a substantial amount of control over its salesmen. It did this in part through the instructions and assistance it rendered to the salesmen in individual conferences with them, through the regular staff meetings, and through the various educational opportunities offered them (B. A. 76, 83-84, 97, 116-117). It was able further to check and supervise the work of the salesmen through weekly reports in which the salesmen were required to furnish a detailed account of their daily activities and the amount of time spent in such activities (B. A. 80, 97, 152, 195). The Company, moreover,

could effectively control the work of its salesmen by withholding certain commissions which would otherwise be payable if a salesman failed to produce a specified minimum annual requirement, and by discharging or terminating its contract with salesmen for the reason that they failed to maintain minimum requirements or for any other reason which it might choose (*supra*, p. 6). The power to discharge, like the power to hire, is of course, in itself an important element of the right to control. See *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523; *Williams* v. *United States*, 126 F. 2d 129, 132 (C.C.A. 7), certiorari denied, 317 U. S. 655.

Another important consideration stamping the salesmen as employees in this case is the permanent character of the relationship which the Company attempted to establish. The retirement and pensioning plan maintained by the Company for its salesmen (*supra*, p. 6) are irreconcilable with the Company's claim that the salesmen are independent contractors.

In view of the controlling factors mentioned above, it becomes relatively unimportant that the Company's salesmen were paid on a commission basis rather than on a salary or wage basis. It is well established that persons paid on a commission or fee basis may be considered employees. See *United States* v. *Silk*, 331 U. S. 704, 706; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523.

Furthermore, the Company bore the expenses of the salesmen's office facilities and supplies. A true independent contractor furnishes his own place of business and bears the expense of maintaining it. This expense is usually a part of the risk or the chance for profit and loss which the independent contractor must assume. See, e.g., *Restatement of the Law of Agency,* Sec. 220 (2) (e); *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722; *Williams* v. *United States,* 126 F. 2d 129, 132, certiorari denied, 317 U. S. 655. In this case it is the Company that invests its money in the work of the salesman and bears the risk of financial loss. The salesman invests no capital and, like a piece-worker, can stand to lose little but his time.

2. The holding of the Board (B. A. 8-10) and the court below (S. P. 9) that the conduct of Davis and Johnson in discussing with the other salesmen their interest in a more permanent cashier and in drafting a letter to the Company setting forth their interest was concerted activity for mutual aid and protection is in accord with the plain language of the Act, and the decisions under it. Section 7 of the original Act provided:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose

of collective bargaining or *other mutual aid or protection.*[5] [Italics supplied]

If, as the Company argues (Pet. 9-12), Congress had intended to protect only concerted activities for the purpose of forming a labor organization and bargaining collectively the phrase "other mutual aid or protection" would not have been used. The word "other" makes clear that Congress intended to protect from employer interference not only concerted activities of employees in connection with the formation and administration of labor organizations and collective bargaining, but also activities for mutual aid and protection other than those connected with unionization and collective bargaining. The Act has been so construed by the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Peter C. K. Swiss Choc. Co.*, 130 F. 2d 503, in which a discharge of the president of a union for drafting a resolution in support of a farmers' strike was held to violate the statute.

As the Board found (B. A. 9-10), the manner in which the cashier's department functioned had a direct effect upon the work of the salesmen.

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[5] While the determination as to whether the Company committed an unfair labor practice must, of course, be governed by the original Act (see Section 102 of the Labor Management Relations Act, *infra*, p. 26), any doubts as to the intent of Congress to protect activities unrelated to unionization were clarified by the insertion of the word "other" before the phrase "concerted activities" in the Act as amended. Compare Section 7 of the original Act (*infra*, p. 23) with Section 7 of the amended Act (*infra*, p. 25).

They depended upon this department for stenographic service, record keeping, computation of premiums and benefits, receipt and disbursement of premiums, commissions and benefits, drafting of conversion plans, and information concerning policies, premiums, dividends, beneficiaries, and Company regulations pertaining to policies (B. A. 9, 23-24; 85-87, 89-93, 119-120). The previous frequent changes in the personnel of this department had not only burdened the salesmen with the time consuming process of continually "breaking-in" new people (B. A. 24; 57-58, 99-101, 133), but resulted in delays and mistakes which actually jeopardized the salesmen's ability to get or retain customers (B. A. 23-24; 86-92, 99, 135-136). Thus, the salesmen were directed not to contact the home office for information but to obtain it through the cashier's department (B. A. 93, 118). The delay of a day or two in obtaining information or computations as to premium rates, conversion plans or amount of possible benefits often meant the loss of a customer who changed his mind while waiting (B. A. 90). The last cashier had not known much about figuring conversions (B. A. 89-90). Among the mistakes which had occurred were several instances of miscalculation of the premium resulting in either overcharges or undercharges which the salesmen then had to correct (B. A. 87). Several customers had complained that their premium deposit fund had been applied to pay premiums although their contract had specified that this

fund was to be allowed to accumulate and bills for premiums be sent the customer (B. A. 92). Policies prepared embodied agreements different from the one which the customer had specified (B. A. 88).

It is evident that not only the conditions under which the salesmen worked, but also their earning capacity were affected by the manner in which the cashier's department was operated. The Board was therefore amply justified in finding that "what these salesmen did was closely related to their legitimate interests as employees. In essence, their activity consisted of common discussion of circumstances which they considered elements of grievance concerning their working conditions, and preparation of a method for presenting the grievance to their employer. This was reasonable and temperate conduct by employees who had a real cause for concern" (B. A. 10). And this finding in turn adequately justified the conclusion of the Board (B. A. 10) and the court below (S. P. 9) that "the moderate conduct engaged in by Davis and Johnson bore a sufficiently reasonable relation to the conditions of their employment to fall within the ambit of the statute."

3. As the court below pointed out (S. P. 3) "There can be no doubt as to the act's application to the business of [the Company]. *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643." It is clearly unnecessary to show

that interstate commerce has been interrupted in the particular case. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 320, 326; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 495 (C.C.A. 9) certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380, 383 (C.C.A. 6) certiorari denied, 320 U. S. 740; *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980 (C.C.A. 8) certiorari denied, 323 U. S. 751.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
ROBERT L. STERN,
Special Assistant to the Attorney General.

ROBERT N. DENHAM,
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DAVID P. FINDLING,
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RUTH WEYAND,
Assistant General Counsel,
National Labor Relations Board.

SEPTEMBER, 1948.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any

Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

2. The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Supp. I, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * *

"DEFINITIONS

"SEC. 2. When used in this Act—

* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, * * *.

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